U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: California Service Center Date: NOV 8 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability and as a member of the professions holding an advanced degree. The petitioner initially sought employment as a software engineer at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds an M.S. degree in Electrical Engineering from the [redacted] The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree, and an additional finding of exceptional ability would be of no benefit to the petitioner in this proceeding. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner submits several witness letters to describe her work at [redacted] and its significance. [redacted] systems and equipment engineer at the [redacted]

The [redacted] recognizes the fact that the use [of] Flight Management Systems (FMSs) contributes to the safety and efficiency of scheduled air carriers and general aviation operators throughout the world. These safety gains are made possible only through the efforts of dedicated engineers and computer scientists such as [the petitioner].

[The petitioner] works as a radio and navigation expert on the [redacted]GNS-XLS, FMS team. Her solid background in both signal processing and computer science has enabled her to develop new features for the [redacted] Some of her contributions include: The addition of Distance Measurement Equipment (DME) 700 radio tuning capability, British Aerospace Electronic Flight Instrumentation System (EFIS) radio tunic capability for the four engine regional airline jet, the BAe-146, and airplane constant bank DME Arc Capability for GPS satellite based instrument approaches. . . .

[The petitioner's] knowledge and expertise . . . have resulted in product improvements that continue to enhance the safety features of the Flight Management Systems produced by [redacted] There is a shortage of individuals in the Aerospace Industry qualified to perform this work. Loss of individuals with [the petitioner's] expertise will cause unnecessary delays in FMS development for [redacted]

[redacted] marketing manager at [redacted] states:

The FMS is one of our most important products which is mainly connected with aviation safety, satellite navigation, and computer automation of flight management functions.

Flight Management Systems (FMS) will be key to the implementation of "Free Flight," the Future Air Navigation System (FANS). . . . Today, the freedom for all airspace users to "fly schedule," i.e. dynamically managing flight operations to achieve operational efficiency or adapt to changing operational conditions, is constrained by the limitations of the existing air traffic control (ATC) system. . . . Free Flight will use information technology to link controllers, pilots, and airline dispatch centers in the collaborative management of flight planning and operations. By improving aviation safety, increasing airspace capacity, and providing operational flexibility, Fee Flight represents a fundamental change from today's ATC system. . . .

[The petitioner] is working as a Software Engineer II in charge of Radio Interface (RI) development, such as the communication between the FMS and VOR/DME or GPS. She is one of our few experts in the RI field, which is a very critical part of the FMS. . . . To keep the leadership position in [the] FMS field,

[redacted]

we desire that our software engineers in [the] FMS Department have experience with research work in this area. [The petitioner] is one of the few valuable assets we have in this field at our company.

[redacted] leader of a Software Quality Assurance Team at [redacted] states "[t]he FMS greatly reduces pilot workload, freeing the crew to manage high-level cockpit tasks effectively during all phases of flight," and asserts that the petitioner's "solid software background and experience with FMS is extremely valuable to the Free Flight [project] . . . and provides us the opportunity to maintain the leadership position in the high technology of the international avionics industry. Several other officials of [redacted] and collaborating firms offer similar statements, and one of the petitioner's former university professors states that the petitioner "made several significant contributions" to college projects. A witness from one aviation company attests to the general importance of the FMS but makes no specific mention of the petitioner.

[redacted] stated desire "to keep the leadership position" is not necessarily a national interest issue, if that leadership is in relation to rival U.S. firms. While [redacted] may benefit from being the leader in the field, it is not at all clear how other firms in the same field benefit from that arrangement.

The director requested further evidence to establish that the petitioner meets the guidelines found in Matter of New York State Dept. of Transportation. In response, counsel persuasively establishes the substantial intrinsic merit and national scope of the petitioner's work for a major employer in the aviation industry. Counsel also argues that the petitioner's education, experience, and other factors set her above others in the field. The regulation at 8 C.F.R. 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered," a phrase which almost exactly mirrors some of counsel's language. A plain reading of the statute and regulations shows that aliens of exceptional ability are generally required to present a job offer with a labor certification at the time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor does not, by itself, compel the Service to grant a national interest waiver of the job offer requirement.

Counsel asserts "[w]e have provided no evidence of a shortage in [the petitioner's] field of expertise," but this statement is not entirely consistent with the statement of an [redacted] official (above) that "[t]here is a shortage of individuals in the Aerospace Industry qualified to perform this work."

Counsel states:

> [The petitioner[has developed improvements to the safety features of FMSs. Expert testimony by the FAA, states that this "contributes to the safety and efficiency of scheduled air carriers and general aviation operators throughout the world."

This statement takes [redacted] original assertion out of context. The cited sentence fragment refers to the FMS program as a whole, not to the petitioner's contribution to the project.

The director denied the petition, stating that the petitioner has established the overall importance of her field of endeavor but not that she, as an individual, has had a disproportionately beneficial impact on that field.

On appeal, counsel states that the petitioner "is currently working as an Image Processing Software Engineer with [redacted] . . . developing and implementing image acquisition and image processing software using object oriented technology for use in . . . X-ray image based luggage inspection systems." Clearly, the petitioner has abandoned her work on the FMS program at [redacted] therefore, previous arguments to the effect that the FMS project requires her continued involvement no longer carry any weight..

Counsel states that the petitioner "was a key engineer with [redacted]" but the record does not establish that the petitioner's work was key to the entire corporation, as opposed to one working group for a particular project out of many in development there. The record does not establish that the petitioner's now-concluded contribution to FMS was particularly noteworthy in comparison to the work of others who participated in the project.

The record contains no evidence regarding the petitioner's current work at [redacted] Even if the new employment claim were fully documented, the petitioner was not working there when the petition was filed, and therefore there is no way for the director to have taken this information into account at the time the petition was filed. If the petition was not approvable at the time it was filed, the petitioner's subsequent employment cannot suffice to establish eligibility. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Counsel asserts that "subjecting [the petitioner] to the labor certification process would adversely affect US efforts" in her field. Service files indicate that the alien in this proceeding is already the beneficiary of not one but two approved immigrant visa

petitions,[1] each of which included an approved labor certification. One of these petitions was filed by [redacted] Therefore, the ability of [redacted] to secure a labor certification for this alien is confirmed beyond reasonable dispute. Given that both applications for labor certification were pending when the petition at hand was filed, and one had already been approved before this appeal was filed, it is not at all clear what negative consequences attach to labor certification as pertains to this petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

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[1]Receipt numbers WAC 99 247 50034 and LIN 99 028 51500.